Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HILDA RODRIGUEZ, and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the United States obtain automatic dismissal under the fugitive disentitlement doctrine of adverse claims in a civil forfeiture proceeding where (a) the property is located wholly outside the United States, (b) the claimants are neither residents nor citizens of the United States, and the court lacks personal jurisdiction over them, and (c) the indictment from which they allegedly fled was filed only after the claimants objected to the forfeiture, long after the original indictment on which the forfeiture was based, and the only overt acts allegedly involving the claimants were not directed at any action or property within the United States?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the Appendix at 1a-2a. The decision of the United States District Court for the Middle District of Florida is unreported and is reproduced at 3a-4a.

JURISDICTION

The Court of Appeals entered its judgment on September 1, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At the time the actions below were commenced, 28 U.S.C. § 1355 provided in relevant part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

In October, 1992, the statute was amended to add the following provision, among others:

> (b)(1) A forfeiture action or proceeding may be brought in—
>
> > (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or
> >
> > (B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.
>
> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

The facts of this case are virtually identical to the facts presented by the petition for writ of *certiorari* in *Alvarez v. United States*, No. 94-636, now pending before this Court.

The differences between the cases are that the properties at issue are located in different countries and that only two of the four petitioners in the *Alvarez* case, Hilda Rodriguez and Saadia Pimentel, are petitioners here. Both cases involve an attempt by the United States government to forfeit property located wholly outside the United States that is owned by individuals who are neither citizens nor residents of the United States. Rather than deciding the merits of the claims at issue, the lower court dismissed petitioners' claims to the property because they failed to appear in a criminal case brought against them *after* they raised significant claims on the merits and jurisdictional defenses in the civil forfeiture proceedings.

On February 24, 1989, the government obtained an indictment of Jose Rodriguez Gacha, a relative of petitioners, and 29 other individuals. RE 29.[1] None of these petitioners was named in that indictment. On January 26, 1990, the government filed a superseding indictment. Again, none of these petitioners was named in that indictment. RE 31.

On August 21, 1991, pursuant to 28 U.S.C. §§ 1355 and 2461, 18 U.S.C. § 981, and 21 U.S.C. § 881, the United States filed civil forfeiture actions in the Middle District of Florida to seize various assets allegedly belonging to Mr. Gacha. RE 100. The government contended that the assets were the traceable proceeds of, or were intended to be used in, drug trafficking. RE 99. The civil forfeiture action at issue here sought assets held in bank accounts outside the United States, not in the name of Mr. Gacha, but in the names of companies in which petitioners claimed an interest. Petitioners each filed a verified claim in the action. RE 33, 40.

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[1] References to the Record Excerpts in the Court of Appeals are designated "RE" followed by a page number. References to the record in the district court are designated "R." followed by a docket number.

The *res*, or property, at issue is approximately $4,000,000, held in three bank accounts in Hong Kong. R. 9; RE 34. On October 16, 1991, petitioners filed a motion to dismiss based on lack of *in rem* jurisdiction, since all of the property at issue was located outside the United States. RE 92, 93. Petitioners' position was strengthened on November 4, 1991, when another district court relied on the Eleventh Circuit's decision in *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.), *cert. denied*, 487 U.S. 1204 (1988), in holding that the United States did not have *in rem* jurisdiction over money in a Hong Kong bank. *United States v. $3,035,648.50 and $330,000 in Hong Kong and Shanghai Banks*, CIV-91-217E (W.D.N.Y. Nov. 4, 1991).

The government sought two extensions of time within which to file an opposition to the motion to dismiss. R. 21, 26. In the meantime, on November 22, 1991, the government obtained a second superseding indictment, which charged petitioners, along with the numerous other people previously named as defendants, in connection with the alleged conspiracy at the base of the forfeiture action. R. 96. The only specific allegations involving petitioners asserted that they became signatories to bank accounts outside the United States in which proceeds from the alleged cocaine smuggling operation were deposited, including the three accounts in this forfeiture action. The charges against petitioners carried penalties of large fines and up to life imprisonment.

Finally, on December 9, 1991, the government filed its opposition to petitioners' motion to dismiss for lack of jurisdiction. The government distinguished the recent decision in *United States v. $3,035,648.50 and $330,000 in Hong Kong and Shanghai Banks*, in part because "the Colombian Claimants are under criminal indictment." R. 29. In opposing subsequent motions, the government made no secret of its reason for obtaining the superseding indictment against petitioners: it assumed that petitioners would not

appear at their arraignment, and, therefore, it was preparing its own motion to dismiss on the ground that the actions could be "readily disposed of under the fugitive disentitlement doctrine," under which criminal appeals and certain other claims of fugitives may be dismissed without reaching the merits. R. 29.

To no one's surprise, petitioners did not travel to the United States to appear in the criminal case. Thereafter, the district court issued an Order to Show Cause in the civil forfeiture action, stating that it lacked both *in rem* and *in personam* jurisdiction, and citing *One Lear Jet Aircraft*, which based *in rem* jurisdiction on the presence of the *res* in the court's territorial jurisdiction. RE 120-22; R. 59.

The government's response to the Order to Show Cause relied on *Republic National Bank of Miami v. United States*, 504 U.S. __, 113 S. Ct. 554 (1992), and 28 U.S.C. § 1355(b)(2), the venue provision relating to forfeiture of foreign property, which was enacted after the forfeiture action in this case had been filed. The district court accepted the government's argument that 28 U.S.C. § 1355(b)(2) conferred extraterritorial jurisdiction in civil forfeiture cases. RE 128. Petitioners' subsequent motion to dismiss, which argued that 28 U.S.C. § 1355(b)(2) required control of the *res* by the United States courts as of the time of the filing of the complaint, was denied. The district court ordered final judgment of forfeiture on November 18, 1993.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissals of petitioners' claims in a four-sentence decision, simply stating that "by fleeing from justice, appellants disentitle themselves from invoking the judicial process in a civil forfeiture action." For that proposition, the court cited *United States v. 7707 S.W. 74th Lane*, 868 F.2d 1214, 1216 (11th Cir. 1989), in which the court of appeals had upheld the application of the fugitive disentitlement doctrine to dismiss the claim in a civil forfeiture action involving property wholly *within* the United

States that allegedly belonged to a Colombian under indictment in the United States. App. 2a. The court did not even address the issues of whether the district court below had jurisdiction to entertain the forfeiture actions or whether the government had acted in bad faith in filing its second superseding indictment in response to petitioners' assertions of claims to the property at issue in this case.

REASONS FOR GRANTING THE WRIT

A writ of *certiorari* should issue in this case for the following reasons: (1) the Eleventh Circuit applied a sweeping rule in dismiss petitioners' claims, contrary to this Court's teaching in *United States v. Ortega-Rodriguez*, __ U.S. __, 113 S. Ct. 1199 (1993); (2) the lower court's erroneous application of rules developed in other contexts improperly precluded a determination of whether the action was properly before the district court; and (3) application of the fugitive disentitlement doctrine under the circumstances present here allows the government unfettered ability to indict in bad faith. These three points are set forth in the petition for writ of *certiorari* now pending before this Court in *Alvarez v. United States*, No. 94-636, and the discussion in that petition is incorporated by reference herein.

In addition, the Seventh Circuit's opinion in *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994), creates a conflict in the circuits regarding the use of the fugitive disentitlement doctrine to dismiss a claim in a civil forfeiture action. That decision, which was not reported until after the petition in *Alvarez* was filed, is a further basis for review in both *Alvarez* and this case.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the pending petition in *Alvarez v. United States*, this petition for a writ of *certiorari* should be granted or the case held if the petition in *Alvarez* is granted.

Respectfully submitted,

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November 23, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3476
Non-Argument Calendar

D.C. Docket No. 91-598-CIV-J-10

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FUNDS IN HONG KONG, contained in account nos. 3201514 (in the name of Transcontinental Traders); 3003105 (in the name of Slavia Association); 03026617 (in the name of Fiducorp S.A.) located at Bank of Credit and Commerce International; CERTAIN FUNDS IN HONG KONG, contained in account no. 20164 972-400 (in the name of Slavia Association) located at Dresdner Bank,

Defendants,

SAADIA CONSTANZA ALVAREZ PIMENTAL [sic];
HILDA RODRIGUEZ DE CABRERA,

Claimants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

(September 1, 1994)

Before TJOFLAT, Chief Judge, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Appellants appeal the district court's dismissal of their claims to certain funds sought by the Government in a civil forfeiture action. The district court dismissed the claims under the fugitive disentitlement doctrine because Appellants are fugitives from justice in a related criminal case. We have held that, by fleeing from justice, appellants disentitle themselves from invoking the judicial process in a civil forfeiture action. *United States v. 7707 S.W. 74th Lane*, 868 F.2d 1214, 1216 (11th Cir. 1989). Therefore, the district court properly dismissed Appellants' claim.

AFFIRMED.

[Filed September 1, 1994.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 91-598-Civ-J-10

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO. 3201514 (IN THE NAME OF TRANSCONTINENTAL TRADERS), BANK OF CREDIT COMMERCE HONG KONG LTD, PRESENTLY HELD IN THE NAME OF THE RECEIVERS FOR TRANSCONTINENTAL TRADERS, INC., HONG KONG AND SHANGHAI BANK CORPORATION, HARCOURT ROAD BRANCH; CERTAIN FUNDS ORIGINALLY CONTAINED IN ACCOUNT NO. 3003105 (IN THE NAME OF SLAVIA ASSOCIATION), BANK OF CREDIT COMMERCE HONG KONG, LTD., PRESENTLY HELD IN THE NAME OF RECEIVERS OF SLAVIA ASSOCIATION, INC. HONG KONG AND SHANGHAI BANK CORPORATION, HARCOURT ROAD BRANCH; and

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO. 20164972-400 (IN THE NAME OF SLAVIA ASSOCIATION), AT DRESDNER BANK, PRESENTLY HELD IN THE NAME OF RECEIVERS OF SLAVIA ASSOCIATION IN HONG KONG AND SHANGHAI BANK CORPORATION, HARCOURT ROAD BRANCH,

Defendants.

FINAL JUDGMENT OF FORFEITURE

Pursuant to the Order of November 1, 1993, granting the government's supplemental motion to dismiss the claims of claimants Saadia Constanza Alvarez Pimentel and Hilda Rodriguez de Cabrera and for entry of final forfeiture judgment, it is hereby

ORDERED and ADJUDGED that all funds contained in the defendant accounts, plus any additional interest accruing thereon, are hereby forfeited to the United States of America.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 18th day of November, 1993.

/sig/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE